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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 03 2005

SRC 00 211 52013

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, for abandonment. The director reopened the matter and subsequently denied the petition on its merits. The matter is now before the Administrative Appeals Office on appeal.[1] The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(B)(ii), as an alien physician. The petitioner asserts that he is an alien physician who has agreed to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals. The director found that the petitioner did not work in a designated area at the time of filing and that the petitioner had not submitted an attestation from a government agency dated within six months prior to the filing date of the petition.

Section 203(b) of the Act, as amended, provides:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.
> >
> > > (ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if–
> > >
> > > > (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
> > > >
> > > > (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

[1] The petitioner actually filed two appeals, one dated December 19, 2003, SRC 04 058 52040, and the other one dated December 23, 2003, SRC 04 060 50270. The latter appeal was filed on a Tuesday, 34 days after the decision was issued, November 18, 2003. Thus, the December 23, 2003 is untimely filed and must be rejected. *See* 8 C.F.R. § 103.3(a)(2)(i) and 8 C.F.R. § 103.5a(b). The remainder of this decision relates to SRC 04 058 52040.

8 C.F.R. § 204.12(c) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit the following evidence:

(1)(i) If the physician will be an employee, a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility. The contract or letter must have been issued and dated within 6 months prior to the date the petition is filed.

(ii) If the physician will establish his or her own practice, the physician's sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps the physician has taken or intends to actually take to establish the practice.

(2) Evidence that the physician will provide full-time clinical medical service:

(i) In a geographical area or areas designated by the Secretary of HHS as having a shortage of health care professionals and in a medical specialty that is within the scope of the Secretary's designation for the geographical area or areas; or

(ii) In a facility under the jurisdiction of the Secretary of VA.

(3) A letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest.

(i) An attestation from a Federal agency must reflect the agency's knowledge of the alien's qualifications and the agency's background in making determinations on matters involving medical affairs so as to substantiate the finding that the alien's work is or will be in the public interest.

(ii) An attestation from the public health department of a State, territory, or the District of Columbia must reflect that the agency has jurisdiction over the place where the alien physician intends to practice clinical medicine. If the alien physician intends to practice clinical medicine in more than one underserved area, attestations from each intended area of practice must be included.

(4) Evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act.

(5) Evidence of the Service-issued waivers, if applicable, of the requirements of sections 212(e) of the Act, if the alien physician has been a J-1 nonimmigrant receiving medical training within the United States.

On October 8, 1996, Spring Hill Medical Center filed a petition in behalf of the current self-petitioner. The petition sought the same classification and a waiver of the job offer requirement in the national interest pursuant to section 203(b)(2)(B) of the Act. The center was located in Hernando County, Florida. The Director, Vermont Service Center, approved the petition on October 10, 1995. On August 28, 2001, the Director, Tampa District Office, issued a notice of automatic revocation based on the termination of Spring Hill Medical Center's business. That decision is not before us on appeal. In 1999, Congress amended section 203(b)(2) of the Act to include subparagraph (ii), providing for national interest waivers of the job offer requirement for certain alien physicians. On June 26, 2000, the petitioner filed the instant petition pursuant to section 203(b)(2)(B)(ii) of the Act. On September 6, 2000, legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), issued interim regulations to implement the statutory amendment. The regulations went into effect on October 6, 2000.

On December 20, 2000, the director issued a request for additional evidence (RFE). The director sent the request to prior counsel. The director did not receive a timely response and, on April 30, 2000, denied the petition for abandonment pursuant to 8 C.F.R. § 103.2 (b)(13). On December 17, 2001, the petitioner, through current counsel, filed a motion to reopen. On August 25, 2003, the director reopened the matter, concluding that the petitioner had not had an opportunity to respond to the December 20, 2000 RFE. The director reissued the RFE, requesting evidence that the petitioner planned to provide clinical medical services in a geographical area designated by the Secretary of Health and Human Services as having a shortage of health care professional and a letter from a federal agency or a state department of public health dated within six months prior to the filing date of the petition.

In response, counsel concedes that the area of intended practice "was not underserved at the time of filing this Petition" but was redesignated in February 2002. Counsel asserts that the area was designated at the time the previous petition was filed and quotes the following from 65 Fed. Reg. 53892 (September 6, 2000):

> The interim rule does not require that a physician relocate to another underserved area should the area the physician is practicing full-time clinical medicine lose its designation as an underserved area. The purpose of such a designation is to foster a greater physician presence in underserved areas. The Service believed one of the desired results of the statutory amendment is for physicians to take up residency in these areas and become integral parts of the community. Once an area is no longer designated as an underserved area, however, the Service can no longer grant national interest waivers for physicians to practice in that area (other than for physicians who will work in a VA facility).

In addition, counsel notes that at the time of filing, the interim regulations had not yet been published. Thus, counsel concludes that petitioner cannot be expected to provide an attestation letter dated within six moths prior to the date of filing since the six month requirement appears in the regulations but not the statute.

The director concluded that the attestation letter must be dated within six months prior to the date of filing and that the prior petition did not relieve the petitioner from establishing that he intended to work in a designated area at the time of filing. On appeal, counsel reiterates his previous arguments.

We find that the six-month requirement should not be applied to petitions filed prior to the effective date of the regulations (October 6, 2000). We note that 8 C.F.R. 204.12 provides:

> (d)(2) *Petitions pending on November 12, 1999.* Section 203(b)(2)(B)(ii) of the Act applies to all petitions that were pending adjudication as of November 12, 1999 before a Service Center, before the associate Commissioner for Examinations, or before a Federal court. Petitioners whose petitions were pending on November 12, 1999, will not be required to submit a new petition, but may be required to submit supplemental evidence noted in paragraph (c) of this section. The requirement that supplemental evidence be issued and dated within 6 months prior to the date on which the petition is filed is not applicable to petitions that were pending as of November 12, 1999. If the case was pending before the Associate Commissioner for Examinations or a Federal court on November 12, 1999, the petitioner should ask for a remand to the proper Service Center for consideration of this new evidence.

Thus, the regulations specifically exempt petitions pending as of the date the law was enacted from the six-month requirement. It is within the spirit of this exemption to apply it to those who filed their petitions after the law was enacted but prior to the effective date of the regulations. It would be fundamentally unfair to require a document dated prior to the effective date of the regulation, when the law on which the regulation is based makes no such specific requirement. Thus, the petitioner has overcome this ground for denial.

We concur with the director, however, that the petitioner must establish that he intended to work in a designated area at the time of filing. *See generally* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The most reasonable interpretation of the provision in the Federal Register quoted above is that it relates to an alien physician working in an area that loses its designated status after the date of filing.

Finally, we note that the petitioner filed a third petition, SRC 03 190 51221, on June 23, 2003. The petition was approved. Thus, the petitioner has already obtained a waiver of the job offer requirement.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.